

ORIGINAL

Kristin St. Peter  
 Assistant Attorney General  
 Office of the Attorney General-Civil Division  
 2nd Floor, Juan A. Sablan Memorial Bldg.  
 Caller Box 10007  
 Saipan, MP 96950  
 Telephone: 664-2341  
 Fax: 664-2349  
 Attorney for Defendants

**FILED**  
 Clerk  
 District Court

MAR 27 2006

For The Northern Mariana Islands  
 By \_\_\_\_\_  
 (Deputy Clerk)

**IN THE UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN MARIANA ISLANDS**

AUTO MARINE, INC., ROLANDO SENORAN,  
 BENJAMIN T. SANTOS, AUGUSTO SANTOS  
 and NORMANDY SANTOS

Plaintiffs,

v.

ANTONIO SABLAN, MEL GREY in his official  
 capacity as Acting Director of Immigration, and  
 RICHARD T. LIZAMA, personally and in his  
 official capacity

Defendants.

CIVIL ACTION NO. 05-0042

**MEMORANDUM OF POINTS AND  
 AUTHORITIES IN SUPPORT OF  
 ANTONIO SABLAN'S MOTION TO  
 DISMISS**

MAY 11 2006

Date: 9:00 a.m.

Time: Judge: Hon. Alex R. Munson

NOW COMES defendant Antonio Sablan and moves this Court to dismiss plaintiffs' First and Second Claims for Relief pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief may be granted.<sup>1</sup> The following memorandum of points and authorities is submitted in support of the motion.

**FACTUAL ALLEGATIONS**

According to the complaint, the corporate plaintiff in this matter, Auto Marine Inc., is engaged in water sport activities. The four individual plaintiffs are all employees of Auto Marine and all citizens of the Philippines. The individual plaintiffs have various official job

<sup>1</sup> The Complaint in this case was originally directed at Antonio Sablan both personally and in his official capacity, because Mr. Sablan was the Acting Director of Immigration at that time. However, he has since been replaced by Mr. Grey, who is now substituted as a party pursuant to Fed. R. Civ. Pro. 25(d).

1 titles, but all operate boats as part of their employment. Each of the individual plaintiffs was  
2 working under an employment contract that was approved by the Commonwealth of the  
3 Northern Mariana Island's Director of Labor. In addition, plaintiff Rolando Senoran was  
4 licensed by the U.S. Coast Guard as a U.S. Merchant Marine Officer.

5 The complaint states that on or about February 15, 2005, the individual plaintiffs were  
6 arrested pursuant to an arrest warrant obtained by defendant Richard T. Lizama for violation of  
7 3 CMC § 4434(e)(1), which prohibits the Director of Labor from approving nonresident worker  
8 certificates for surface tour boat operators, among other job categories. The Commonwealth  
9 has since instituted deportation proceedings against these individuals. According to the  
10 complaint, the Commonwealth has also filed criminal charges against Auto Marine's president,  
11 Adonis Santos, for employing the individual plaintiffs without proper documentation and  
12 authority. These actions were allegedly taken pursuant to a policy approved by Mr. Sablan in  
13 which otherwise lawfully-employed non-resident workers were arrested and deported for  
14 operating boats and/or motor vehicles as part of their employment.

#### 15 LEGAL ARGUMENTS

16 FRCP 12(b)(6) authorizes dismissal for the failure to state a claim upon which relief can  
17 be granted. On a motion to dismiss, the complaint is construed in favor of the plaintiff, but the  
18 court should not assume that "the [plaintiff] can prove facts which [he or she] has not alleged,  
19 or that the defendants have violated the...laws in ways that have not been alleged." *Associated*  
20 *General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S.  
21 519, 526, 103 S. Ct. 897, 902 (1983).

1 I. Plaintiffs' First Claim for Relief, for Declaratory and Injunctive Relief Must be  
 2 Dismissed Because 3 CMC § 4434(e)(1) is Constitutional both on its Face and as  
 3 Applied.<sup>2</sup>

4 A. *The Ninth Circuit has Already Ruled that the Non-Resident Worker Act is*  
 5 *Constitutional.*

6 As the Court is undoubtedly aware, the Non-Resident Worker Act, of which 3 CMC §  
 7 4434(e)(1) is a part, was recently found by the Ninth Circuit not to be a violation of equal  
 8 protection. *Sagana v. Tenorio*, 384 F.3d 731 (9th Cir. 2004). In that case, a non-resident  
 9 worker ordered to depart for lack of valid work status sought to invalidate the entire Act, 3  
 10 CMC § 4411 *et seq*, on the grounds that, inter alia, it violated his right to “freely market his  
 11 labor in the common occupations of life to any prospective employer without restriction and on  
 12 equal terms as any citizen for so long a period as Plaintiff is lawfully admitted to the CNMI as a  
 13 nonresident worker.” *Id* at 735-736. This supposed “right” was based on both 42 U.S.C. §  
 14 1981 and the equal protection clause of the Fourteenth Amendment. The Ninth Circuit found  
 15 that Sagana had no such right. Instead it found that the Act as a whole does not violate the right  
 16 to equal protection. *Id* at 741. However, it declined to extend its ruling to any particular  
 17 portion of the Act. *Id* at 741-742. Plaintiffs now ask this Court to disregard the clear ruling of  
 18 the Ninth Circuit by invalidating a provision at the heart of the Act. In so doing, they begin by  
 19 asking the Court to apply the wrong standard.

20 B. *Plaintiffs Apply the Wrong Standard to 3 CMC § 4434(e)(1).*

21 Plaintiffs argue that 3 CMC § 4434(e)(1), (which, as noted above, essentially prevents  
 22 aliens from working in a number of job categories), lacks “any compelling reason or compelling  
 23 justification.” Complaint at ¶ 51. Therefore, they argue, it is unenforceable on its face and as  
 24 applied. This compelling reason standard is also frequently referred to as “strict scrutiny” and  
 25

---

<sup>2</sup> This section is taken verbatim from the memorandum submitted in support of defendants' Richard Lizama's and Mel Grey's motion to dismiss. It is reproduced in its entirety here for the convenience of the Court.

1 is the highest level of scrutiny that can be brought to bear on a question of equal protection. *See*  
 2 *e.g., Grutter v. Bollinger*, 539 U.S. 306, 326, 123 S. Ct. 2325, 2337-2338, 156 L. Ed. 2d 304  
 3 (2003). It is also the wrong standard to apply to Commonwealth immigration law. Instead, the  
 4 Ninth Circuit has made clear that either intermediate scrutiny (law is substantially related to an  
 5 important government interest) or rational basis scrutiny (law is rationally related to a legitimate  
 6 government interest), should apply to Commonwealth immigration law. *See, Sagana v.*  
 7 *Tenorio*, 384, F.3d 731, 740-742 (9th Cir. 2004).

8 C. *The Law on its Face Easily Survives Rational Basis Scrutiny.*

9 **1. Rational Basis Scrutiny is the Proper Standard.**

10 The first step in analyzing an equal protection claim is to determine the appropriate  
 11 standard of review. The standard applicable to immigration laws under the United States  
 12 Constitution is a “rational basis” standard. The federal government’s exercise of its  
 13 immigration authority is subject to extremely limited review. It receives almost total deference  
 14 from courts. “[O]ver no conceivable subject is the legislative power of Congress more  
 15 complete than it is over the admission of aliens. *Oceanic Steam Navigation Co. v. Stranahan*,  
 16 214 U.S. 320, 339, 29 S. Ct. 671, 676 (1909). The Supreme Court has held that “[its] cases  
 17 have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute  
 18 exercised by the Government’s political departments largely immune from judicial control.”  
 19 *Fiallo v. Bell*, 430 U.S. 787, 792, 97 S. Ct. 1473, 1478 (1977) (Internal citations and quotation  
 20 marks omitted). As a result, and as the Supreme Court has repeatedly noted, “Congress  
 21 regularly makes rules [using its immigration authority] that would be unacceptable if applied to  
 22 citizens.” *Id.* (quoting *Matthew v. Diaz*, 426 U.S. 67, 80, 96 S. Ct. 1883, 1893 (1976)). As long  
 23 as those rules are not “wholly irrational”, they should be upheld. *Diaz*, 426 U.S. at 83, 96 S. Ct.  
 24 at 1893.

25 As this Court held in the *Sagana* case, the Commonwealth occupies the same position as  
 the federal government with respect to immigration. *Sagana v. Tenorio*, Civ. Act. 01-0003

1 “Order Denying Plaintiff’s Motion for Summary Judgment and Dismissing Case with  
 2 Prejudice” at page 9 (April 9, 2003) (Opinion attached as Exhibit 1).<sup>3</sup> As with the federal  
 3 government, it is a routine and legitimate part of the business of the Commonwealth to classify  
 4 on the basis of alien status. Indeed, this Court found that the Commonwealth’s Nonresident  
 5 Worker Act, of which 3 CMC § 4434(e)(1) is a part, is strikingly similar to the federal  
 6 government’s H2-B Visa program. *Id* at 13.<sup>4</sup> Of course, the Commonwealth differs from the  
 7 federal government in that the federal government’s power derives directly from the  
 8 Constitution and the Commonwealth’s power derives from the Covenant. However, the  
 9 Covenant is the supreme law with respect to the Commonwealth, just like the Constitution is the  
 10 supreme law elsewhere in the United States. As Section 102 of the Covenant provides:

11       The relations between the Northern Mariana Islands and the United States will  
 12       be governed by this Covenant which, together with those provisions of the  
 13       Constitution, treaties and laws of the United States applicable to the Northern  
       Mariana Islands, will be the *supreme law of the Northern Mariana Islands*.

14 (emphasis added.) Moreover, the Commonwealth’s power is a delegation of power from  
 15 Congress through the Covenant. Thus, the Commonwealth indirectly derives its power from the  
 16 same source as the federal government – the U.S. Constitution.

17       As the Commonwealth’s immigration authority is strikingly similar to that of the federal  
 18 government, its immigration activities are the same as those of the federal government, and its  
 19 immigration powers are drawn indirectly from the U.S. Constitution itself, the  
 20 Commonwealth’s exercise of its immigration responsibilities should be judged by the same  
 21 standard as the federal government’s: rational scrutiny.

---

23 <sup>3</sup> On appeal, the Ninth Circuit declined to decide whether rational basis or intermediate scrutiny should apply to the  
 24 Commonwealth’s immigration laws. Instead, it declared that the Non-Resident Worker Act survived either level of  
 25 scrutiny. *Sagana*, 384 F.3d at 742. Notably, the Ninth Circuit placed the burden of proof on the plaintiff,  
 regardless of which standard applied. *Id*.

<sup>4</sup> Under the federal program, aliens must show that “qualified people in the United States are not available and that  
 employment of the beneficiary(ies) will not adversely affect wages and working conditions of workers in the  
 United States similarly employed . . . .” 8 C.F.R. § 214.2(h)(6)(vi)(1) (2003).

1                   **2.       3 CMC § 4434(e)(1) Clearly Survives Rational Basis Scrutiny**

2           A court applying rational basis scrutiny to a statute is to be highly deferential to the  
3 decisions of the legislature. *See Heller v. Doe*, 509 U.S. 312, 319, 113 S. Ct. 2637, 2642 (1993)  
4 (holding that “rational-basis review in equal protection analysis is not a license for courts to  
5 judge the wisdom, fairness, or logic of legislative choices.”) A statute survives rational basis  
6 scrutiny “if there is a rational relationship between the disparity of treatment and some  
7 legitimate governmental purpose.” *Id.* Moreover, the government need not actually articulate  
8 the legitimate purpose or rationale supporting the classification. Instead, a statute “must be  
9 upheld against equal protection challenge if there is any reasonably conceivable state of facts  
10 that could provide a rational basis for the classification.” *Id.* (internal citation and quotation  
11 marks omitted). The Court is required, under the rational basis standard, “to accept a  
12 legislature's generalizations even when there is an imperfect fit between means and ends. A  
13 classification does not fail rational-basis review because it is not made with mathematical nicety  
14 or because in practice it results in some inequality.” *Id.* 509 U.S. at 321, 113 S. Ct. at 2643  
15 (citations omitted).

16           In this case, the purposes of the Act are set forth clearly in 3 CMC § 4411, in which the  
17 Commonwealth Legislature stated that “it is essential to a balanced and stable economy...that  
18 residents be given preference in employment.” *Id.* at § 4411(a). However, the Legislature also  
19 recognized, “the need for alien labor at the present state of economic development.” *Id.* In  
20 *Sagana*, the Ninth Circuit referred to these as “reasonable, important purposes,” *Sagana*, 384  
21 F.3d at 742, easily satisfying the requirement that the goals of the Act be a “legitimate  
22 governmental purpose.” *Heller*, 509 U.S. at 320, 113 S. Ct. at 2642.

23           The only requirement remaining is that § 4434(e)(1) have a rational relationship with  
24 these important governmental purposes. As plaintiffs choose entirely the wrong standard  
25 (compelling government interest) in their complaint, it perhaps goes without saying that they  
have not met their burden of showing that § 4434(e)(1) does not have a rational relationship

1 with the legitimate governmental purposes. *See Sagana*, 384 F.3d at 742. On this ground  
2 alone, the Court should dismiss plaintiffs' first cause of action.

3 Having said that, there is a rational relationship between the statute and the  
4 governmental purposes. The law simply provides that a few, narrowly-defined occupations are  
5 off-limits to nonresident workers, thereby serving the government's interest in preserving  
6 employment opportunities for locals in occupations the government apparently felt they were  
7 well-qualified to perform, while leaving many others open for nonresident workers. Plaintiffs  
8 have not met their burden and their claim for declaratory and injunctive relief should be  
9 dismissed.

10 D. *The Law on its Face also Survives Intermediate Scrutiny.*

11 Of course, plaintiffs might argue that rational basis is the wrong standard to apply, that  
12 the Court should apply intermediate scrutiny instead. This Court has previously ruled that  
13 rational basis scrutiny should apply, but the Ninth Circuit has implied that intermediate scrutiny  
14 might be the proper standard, though it is greater scrutiny than is applied to immigration laws  
15 passed by the U.S. Congress. *See Sagana* at 384 F. 3d at 741-742. Unfortunately for plaintiffs,  
16 even if this Court were to apply the intermediate standard here, their claim would still fail. The  
17 Ninth Circuit has already determined that the Nonresident Workers Act as a whole survives  
18 intermediate scrutiny and § 4434(e)(1) is a central tenet of that Act and one that directly serves  
19 the important governmental interest of promoting employment opportunities for CNMI  
20 residents. In addition, as was noted above, the plaintiffs wrongly choose the "compelling  
21 reason" standard in making their complaint and so have clearly failed to allege that § 4434(e)(1)  
22 is not "closely related to important government goals." As the Ninth Circuit has clearly put the  
23 burden of proof on those seeking to overturn the Commonwealth's immigration laws, *Sagana*,  
24 384 F.3d at 742, plaintiffs have also failed to meet their burden under intermediate scrutiny and  
25 their First Claim for Relief should therefore be dismissed.



1 E. 3 CMC § 4434(e)(1) Does not Violate the Right to Equal Protection as Applied.

2 In addition to their facial challenge, plaintiffs also allege that 3 CMC § 4434(e)(1)  
 3 violates their right to equal protection as applied to them. Such a claim requires an allegation  
 4 that the plaintiffs have been treated differently than other similarly situated persons. *Sagana*,  
 5 384 F.3d at 740. In this case, the only basis of the plaintiffs' as-applied claim apparent in the  
 6 complaint is that they are being treated differently than others on the basis of their status as  
 7 either aliens or as a corporation that employs aliens. If this is the basis of their as-applied claim,  
 8 then the claim is superfluous because § 4434(e)(1) is discriminatory on its face against all aliens  
 9 and their potential employers, not just as applied to the plaintiffs particularly, and the important  
 10 interest that discrimination serves has been clearly delineated above. If the as-applied claim has  
 11 some other basis, it is not pleaded in the complaint. In either case, the claim should be  
 12 dismissed.

13 II. Plaintiffs' Second Cause of Action Must be Dismissed as No Violation of the Right to  
 14 Equal Protection Has Been Shown.<sup>5</sup>

15 Plaintiffs' second cause of action is for violation of their right to equal protection, made  
 16 enforceable under 42 U.S.C. § 1983. As was noted above, the factual basis for this claim is not  
 17 clear. More specifically, it is not clear whether plaintiffs are alleging that they were treated  
 18 differently than others similarly situated *because* they were aliens (or an employer of aliens) or  
 19 are alleging that they were treated differently *than* other aliens (or employers of aliens). If it is  
 20 the former, then it is the law itself that they are challenging and, as was demonstrated above,  
 21 this challenge must fail because the law passes constitutional muster. If it is the latter, then the  
 22 challenge must fail because plaintiffs have failed to make the necessary allegation of differential  
 23 treatment. *See Sagana*, 384 F.3d at 740.

---

24  
 25 <sup>5</sup> Sections II and III of this memorandum are essentially identical to Sections III and IV of the memorandum submitted in support of defendants' Richard Lizama's and Mel Grey's motion to dismiss.



1 In either case, plaintiffs are alleging differential treatment, but not one based on any  
 2 suspect classification.<sup>6</sup> As such, plaintiffs' equal protection claim is subject only to rational  
 3 basis scrutiny. *See Nelson v. City of Selma*, 881 F. 2d 836, 838-839 (9th Cir. 1989). Plaintiffs  
 4 also "[bear] the burden of proving that [they have] been intentionally treated differently from  
 5 others similarly situated and that there is no rational basis for the difference in treatment."  
 6 *Thornton v. City of St. Helens*, 425 F. 3d 1158, 1167 (9th Cir. 2005). In meeting this burden,  
 7 plaintiffs must "allege facts sufficient to overcome the presumption of rationality that applies to  
 8 government classifications." *Wroblewski v. City of Washburn*, 965 F. 2d 452, 460 (7th Cir.  
 9 1992). In this case, all plaintiffs have alleged is that they have had the law enforced against  
 10 them, when it might not have been enforced against others. This is simply insufficient.

11 In fact, this is a classic example of seeking to have the law go unenforced against you  
 12 because it has gone unenforced against others. Unfortunately for plaintiffs, this is not  
 13 something they have any right to because,

14 "There is no right under the Constitution to have the law go unenforced against  
 15 you, even if you are the first person against whom it is enforced, and even if you  
 16 think (or can prove) that you are not as culpable as some others who have gone  
 17 unpunished. The law does not need to be enforced everywhere to be legitimately  
 18 enforced somewhere..."

19 *Futernick v. Sumptner Township*, 78 F. 3d 1051, 1056, (6th Cir. 1996). In sum,  
 20 plaintiffs have entirely failed to meet the pleading requirements for a claim under 42 U.S.C. §  
 21 1983 and their claims should therefore be dismissed.

### 22 III. Mr. Sablan is Protected by Qualified Immunity.

23 The U.S. Supreme Court created the doctrine of qualified immunity to reduce the burden  
 24 of civil rights litigation on public officials and the federal court system. *See, Harlow v.*  
 25 *Fitzgerald*, 457 U.S. 800, 816-817, 102 S. Ct. 2727, 2737-2738 (1982). It was designed to  
 weed out frivolous lawsuits, such as this one, at an early stage. *See id.* Under *Harlow*, a

---

<sup>6</sup> For reasons noted above, alienage in the context of immigration laws is not a suspect classification – it would be more correct to say that is the subject of the classification

1 government official like Mr. Sablan is shielded from civil liability “insofar as their conduct does  
2 not violate clearly established statutory or constitutional rights of which a reasonable person  
3 would have known.” *Id.*, 457 U.S. at 818, 102 S. Ct. at 2738. In determining whether a  
4 plaintiff may overcome qualified immunity and pursue a § 1983 cause of action against a  
5 government official in his personal capacity, the initial, threshold inquiry is two-fold: whether  
6 the facts show that a constitutional right was violated and, if so, whether that right was clearly  
7 established. *Knox v. Smith*, 342 F.3d 651, 657 (7th Cir. 2003). The first part of this inquiry is  
8 important because a finding in favor of the defendant on it cuts-off further inquiry. *Saucier v.*  
9 *Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156 (2001).

10 A. *Plaintiffs have not Shown any Constitutional Violation.*

11 As is demonstrated above, plaintiffs have not shown a violation of their constitutional  
12 right to equal protection at the appropriate level of scrutiny. The plaintiffs have not alleged that  
13 they were “intentionally treated differently from others similarly situated and that there is no  
14 rational basis for the difference in treatment,” *Thornton v. City of St. Helens*, 425 F. 3d 1158,  
15 1167 (9th Cir. 2005), as is required under rational basis scrutiny. They also have not alleged  
16 that Mr. Sablan’s actions were “not closely related to...important governmental goals...,”  
17 *Sagana*, 384 F.3d at 741, as required under intermediate scrutiny. Failing to do so is fatal to  
18 plaintiffs’ third claim for relief and this claim should be dismissed.

19 B. *Even if a Constitutional Right was Violated, that Right is not Clearly Established.*

20 In addition to demonstrating that a constitutional right was violated, the plaintiffs must  
21 also prove that the right they seek to enforce was clearly established. A right is clearly  
22 established, “when the contours of the right are sufficiently clear that a reasonable official  
23 would understand that what he is doing violates that right.” *Camarillo v. McCarthy*, 998 F. 2d  
24 638, 640 (9th Cir. 1993), *citing*, *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034,  
25 3039, 97 L.Ed.2d 523 (1987) (internal quotation marks omitted). In this case Mr. Sablan simply  
promoted the enforcement of a clear provision of a law that had recently been declared


1 constitutional by the Ninth Circuit. *See Sagana v. Tenorio*, 384 F.3d 731, 740-742 (9th Cir.  
2 2004). Under these circumstances, only a very unreasonable official could conclude that  
3 enforcing that law would violate anyone's rights. If the Court concludes that Mr. Sablan's  
4 conduct in this case did violate a constitutional right, he is entitled to qualified immunity and  
5 the third claim for relief should still be dismissed.

6 CONCLUSION

7 For the foregoing reasons, plaintiffs' First and Second Claims for Relief against Antonio  
8 Sablan should be dismissed for failure to state a claim upon which relief may be granted. As  
9 these are the only two claims for relief aimed at Mr. Sablan, he should be dismissed from this  
10 action entirely.

11 Date: March 23, 2006.

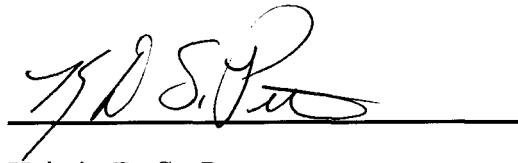
12 Respectfully submitted,  
13 OFFICE OF THE ATTORNEY GENERAL

14 By:   
15 Kristin St. Peter  
16 Assistant Attorney General  
17  
18  
19  
20  
21  
22  
23  
24  
25

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a copy of the foregoing was served by personal service on the 27 day of March, 2006, upon the following:

G. ANTHONY LONG  
2<sup>nd</sup> Floor Lim's Building  
P.O. Box 504970  
San Jose, Saipan, MP 96950

A handwritten signature in black ink, appearing to read 'K.D. St. Peter', is written over a solid horizontal line.

Kristin D. St. Peter

Assistant Attorney General